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The Fate of the Native Hawaiians: The Special Relationship Doctrine, the Problem of Strict Scrutiny, and Other Issues Raised by Rice v. Cayetano

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THE FATE OF THE NATIVE HAWAIIANS: THE SPECIAL RELATIONSHIP DOCTRINE, THE PROBLEM OF STRICT SCRUTINY, AND OTHER ISSUES RAISED BY *RICE V. CAYETANO*

I. INTRODUCTION

Harold "Freddy" Rice is a Native Hawaiian in the sense that he was born in the Hawaiian Islands and can "trace[ ] his ancestry to two members of the legislature of the Kingdom of Hawaii, prior to the Revolution of 1893."[1] He is a taxpayer and a qualified elector of the United States, the State of Hawaii, and the County of Hawaii.[2] When Rice applied to vote in the 1996 election for the trustees of the Office of Hawaiian Affairs ("OHA"),[3] however, his application was denied.[4] Why? Because, according to a state statute, he was not Hawaiian enough.[5]

Almost a century before Rice was denied a vote in the OHA elections, the last queen of Hawaii signed an official protest to the United States Annexation Resolution,[6] in which the Republic of

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1. Rice v. Cayetano, 963 F. Supp. 1547, 1548 (D. Haw. 1997), *aff'd*, 146 F.3d 1075 (9th Cir. 1998), *rev'd*, 528 U.S. 495 (2000).

2. *Id.*

3. The OHA is a state agency designed to improve the living conditions of Native Hawaiians using revenues from ceded lands. *See* HAW. CONST. art. XII, § 5.

4. *Rice*, 528 U.S. at 498.

5. *See* HAW. REV. STAT. § 13D-3 (1993) (defining the electorate allowed to vote as including only "Hawaiians" and "Native Hawaiians"). The pertinent part of the Code of Hawaii defines "Hawaiians" as "any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii." *Id.* § 10-2. "Native Hawaiians" are defined as "any descendant of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778, as defined by the Hawaiian Homes Commission Act, 1920, as amended." *Id.* The Supreme Court opinion also includes a discussion of the various definitions critical to the case. *Rice*, 528 U.S. at 509-10.

6. Lili'uokalani, Official Protest to the Treaty of Annexation (June 17, 1897) *available at* http://www.hawaii-nation.org/treatyprot.html. Lili'uokalani also protested the Annexation Act because it confiscated 4,000,000 acres of Hawaiian lands that were

> technically called the crown lands, those legally entitled thereto . . . receiving no consideration whatever for estates, their title to which has been always

Hawaii ceded 1,800,000 acres of "public, Government, or Crown lands" to the United States.[7] In her written protest, signed in Washington, D.C., on June 17, 1897, Queen Lili'uokalani pronounced the annexation "wrong toward the native and part-native people of Hawaii" and "an act of gross injustice."[8]

Queen Lili'uokalani's declaration echoed the hopes of all world leaders: that their nations' sovereignties are immortal. History offers a different story, however, one of bigger sovereigns swallowing up smaller ones in pursuit of geographic and cultural dominance. A century after England's Captain Cook made landfall in Hawaii in 1778,[9] Queen Lili'uokalani's monarchy was overthrown with the aid of American forces.[10] Later, in 1898, America successfully annexed Hawaii and established the islands as a separate Republic to be part of the United States.[11] The Admission Act of 1959 sealed Hawaii's fate by establishing it as America's fiftieth state.[12]

If Native Hawaiians felt their sovereignty besmirched by American encroachment, perhaps they found some solace in a 1993 Joint Resolution in which Congress officially apologized for America's participation in "the illegal overthrow of the kingdom of Hawaii."[13]

The foregoing has a good deal to do with Harold "Freddy"

> undisputed, and which is legitimately in my name at this date.
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> . . . .
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> [The] treaty ignores, not only all professions of perpetual amity and good faith made by the United Staets [sic] in former treaties with the sovereigns representing the Hawaiian people, but all treaties made by those sovereigns with other and friendly powers, and it is thereby in violation of international law.

Id. The Annexation Resolution may be found at J. Res. 55, 55th Cong., 30 Stat. 750 (1898).

7. J. Res. 55, 55th Cong., 30 Stat. 750 (1898).

8. Lili'uokalani, *supra* note 6, at 1. *See generally* HELENA G. ALLEN, THE BETRAYAL OF LILI'UOKALANI: LAST QUEEN OF HAWAII 1838-1917 (1982); *The American Perspective: Lili'uokalani's Legacy* (PBS television broadcast, 1990). Of the fate of Hawaiian sovereignty, Queen Lili'uokalani wrote: "The cause of Hawaii and independence is larger and dearer than the life of any man connected with it. Love of country is deep-seated in the breast of every Hawaiian, whatever his station." *Hawaii: Independent & Sovereign, available at* http://www.hawaii-nation.org (last visited Nov. 4, 2000).

9. RALPH S. KUYKENDALL & A. GROVE DAY, HAWAII: A HISTORY 14 (2d ed. 1949).

10. Rice v. Cayetano, 528 U.S. 495, 505 (2000).

11. *Id.*

12. *See id.*

13. Apology Resolution, Pub. L. No. 103-150, 107 Stat. 1510, 1513 (1993).

Rice.[14] It paints in broad strokes the historical context behind *Rice v. Cayetano*,[15] a case in which the Supreme Court struck down a Hawaii voting restriction that permitted only persons with Native Hawaiian blood to vote for the trustees of the OHA.[16]

A case that mixes race, history, and evolving constitutional doctrine, *Rice* reflects the Rehnquist Court's crusade against government programs that offer preferences to racial minorities who have faced discrimination in the past.[17] It also marks the first time the Court has used the Fifteenth Amendment, which was adopted after the Civil War to protect African-Americans, to protect the voting rights of a white man.[18]

In *Rice*, the Supreme Court expressly avoided a ripe opportunity to articulate what, if any, special relationship Native Hawaiians enjoy with the federal government. Specifically, the Court rejected out-of-hand the notion that Native Hawaiians are analogous to Indian tribes and are thereby entitled to the same types of self-governmental programs with racial preferences as the Indians.[19] Reversing both the District Court for the District of Hawaii and the Ninth Circuit Court of Appeals,[20] the Supreme Court declined to even *consider* whether Native Hawaiians are Native Americans in the legal sense.[21] Put another way, the Court was blind to the more than 160 congressional laws that expressly include Native Hawaiians in the same category as Native

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14. *See* Linda Greenhouse, *Justices to Weigh Race Barrier in Hawaiian Voting*, N.Y. TIMES, Mar. 23, 1999, at A18.

15. 528 U.S. 495 (2000).

16. *Id.* at 495-97.

17. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); *see also* Joan Biskupic, *Hawaiian Voting Limit Rejected; Court Strikes Down Race-Based Selection of Agency Trustees*, WASH. POST, Feb. 24, 2000, at A9.

18. Biskupic, *supra* note 17.

19. *Rice*, 528 U.S. at 518-19. *Compare* Stuart Minor Benjamin, *Equal Protection and the Special Relationship: The Case of the Native Hawaiians*, 106 YALE L.J. 537 (1996) (arguing that under current Supreme Court jurisprudence, government programs designed to benefit Native Hawaiians must be analyzed under the most heightened level of scrutiny), *with* Jon M. Van Dyke, *The Political Status of the Native Hawaiian People*, 17 YALE L. & POL'Y REV. 95 (1998) (arguing that programs designed to benefit Native Hawaiians should be examined using the same level of review that applies to programs for other Native Americans). For purposes of clarity and simplicity, the terms "Native American" and "Indian" are used synonymously in this note, except where a distinction is warranted.

20. *Rice*, 528 U.S. at 511.

21. *Id.* at 518.

Indians, thus according them the same special protection.[22]

Native American jurisprudence makes clear that the Indian tribes enjoy a "quasi-sovereign," or "special relationship," with the federal government.[23] This "special relationship" tends to militate against equal protection challenges to government programs with preferences designed to benefit Indians.[24] Accordingly, the Court has routinely upheld government programs that give preferences to Indian tribes since such classifications are rooted not in racial classifications, but in political or legal status.[25]

Because the classification of Native Americans is not racial, the Court has applied mere rational basis review analysis to government programs that single out Native Americans for special treatment.[26] Under the rational basis review scheme, the government need only show that a particular program is reasonably and rationally tied to the advancement of a governmental interest for a court to uphold the constitutionality of the program.[27]

Because the Court in *Rice* refused to articulate whether Native Hawaiians enjoy the same "special relationship" with the government as the Indian tribes and are thus Native American in the legal sense, it unbegrudgingly applied strict scrutiny to Hawaii's voting law and struck it down as unconstitutional on Fifteenth Amendment grounds.[28] By applying the most severe level of scrutiny to Hawaii's voting law, the Court's decision in *Rice*

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22. *See infra* note 103.

23. *See, e.g.*, Washington v. Confederated Bands & Tribes of the Yakima Indian Nation, 439 U.S. 463, 500-01 (1979) ("'[T]he unique legal status of Indian tribes under federal law permits the Federal Government to enact legislation singling out tribal Indians, legislation that might otherwise be constitutionally offensive.'") (quoting Morton v. Mancari, 417 U.S. 535, 551 (1974)); United States v. Antelope, 430 U.S. 641, 645 (1977); United States v. Mazurie, 419 U.S. 544, 557 (1975) ("Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory.") (construing Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 557 (1832)). According to the court in *Mancari*:

> Literally every piece of legislation dealing with Indian tribes . . . single[s] out for special treatment a constituency of tribal Indians . . . . If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized.

Mancari, 417 U.S. at 552 (1974).

24. *See Yakima*, 439 U.S. 463; *Antelope*, 430 U.S. 641; *Mazurie*, 419 U.S. 544.

25. *See Yakima*, 439 U.S. 463; *Antelope*, 430 U.S. 641; *Mazurie*, 419 U.S. 544.

26. *See Yakima*, 439 U.S. 463; *Antelope*, 430 U.S. 641; *Mancari*, 417 U.S. 535.

27. *See Yakima*, 439 U.S. 463; *Antelope*, 430 U.S. 641; *Mancari*, 417 U.S. 535.

28. *Rice*, 528 U.S. at 522.

raises serious doubts about the future of programs designed to benefit Native Hawaiians. For one, the decision calls into question whether various lower court decisions which recognize that Native Hawaiians have the same legal status as other native peoples would survive if challenged in the wake of *Rice*.[29]

Another reading of the case suggests, however, that the *Rice* decision is but a logical reaffirmation of the Court's reasoning in its recent redistricting cases,[30] which sharply define the Constitution's strict prohibition against using race as a condition of voting.[31]

Still, fear that future legislation designed to benefit Native Hawaiians will face strict scrutiny in the courts may be legitimate for one principal reason. The Court refused to hear Rice's equal protection claim, arguing instead that Hawaii's voting law ran patently afoul of the Fifteenth Amendment.[32] The Court nevertheless assumed, without deciding, that Hawaii could treat Native Hawaiians as an Indian tribe.[33] Thus, the Court's application of strict scrutiny suggests, albeit implicitly, that programs designed to benefit Native Hawaiians will be subject to this most exacting level of review in the future.

The *Rice* decision is also quite significant in light of the important issues with which the Court chose not to wrestle: namely, whether the Native Hawaiians enjoy equal status with the federal government as Native Indians specifically, and Native Americans generally.[34] In short, the Court's silence on this important issue suggests that Native Hawaiians are *not* Native Americans, do not enjoy the same "special relationship" with the federal government as the Indian tribes, and are not subject to the same rights and privileges of tribal Indian sovereigns.

This note examines the analysis behind, and potential impact of, the *Rice* decision. Part II provides a brief history of the Fifteenth Amendment and its evolution since its post-Civil War

29. *See, e.g.*, Ahuna v. Dep't of Hawaiian Home Lands, 640 P.2d 1161, 1168-69 (Haw. 1982).

30. *See, e.g.*, Shaw v. Reno, 509 U.S. 630 (1993) (concerning North Carolina congressional districts).

31. *See infra* note 42.

32. *Rice*, 528 U.S. at 522.

33. *See id.* at 524 (Breyer, J., concurring).

34. *Id.* at 518.

adoption. Part III discusses the historical backdrop of *Rice*, including an overview of the significant historical events undergirding the law as it applies to Native Hawaiians. The *Rice* decision itself is set forth and explained in Part IV. Part V analyzes and critiques the *Rice* decision; emphasis is placed on the competing interests involved in the case, and whence those interests find legal support. Finally, Part VI discusses the impact of the *Rice* decision on future challenges to laws designed to benefit Native Hawaiians specifically, and Native Americans generally.

II. THE LAW LURKING BEHIND THE VOTING FRANCHISE

A. *Color Blind Democracy? The Fifteenth Amendment*

The right to vote is a firmly rooted right essential to the orchestration of American democracy. The Supreme Court has sounded this chorus by holding that the voting right is "preservative of other basic civil and political rights."[35] While the right to vote is a fundamental one, various amendments have been added to the U.S. Constitution that both circumscribe and expand the franchise's force and effect.[36] These amendments essentially amount to restrictions on the abilities of states to impose franchise requirements on voting schemes.[37] For example, the Nineteenth Amendment prohibits gender discrimination in voting,[38] the Twenty-Fourth Amendment prohibits the states from imposing a poll tax as a condition of voting,[39] and the Twenty-Sixth Amendment grants the right to vote to all citizens over the age of eighteen.[40]

Adopted in 1870 as the last of the Civil War Amendments,[41] the

35. Reynolds v. Sims, 377 U.S. 533, 562 (1964).

36. *See generally* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 14.31 (5th ed. 1995).

37. *See id.*

38. U.S. CONST. amend. XIX, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.").

39. U.S. CONST. amend. XXIV, § 1 ("The right of citizens of the United States to vote in any primary or other election . . . shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.").

40. U.S. CONST. amend XXVI, § 1 ("The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.").

41. The Civil War Amendments, added to the Constitution to help remedy the une-

Fifteenth Amendment prohibits states from abridging or denying a citizen's right to vote on the basis of race.[42] Despite the express language of the Fifteenth Amendment, over the years states have devised clever, and sometimes not so clever, schemes that discriminate against minorities.[43]

In the White Primary Cases, the Court made clear that a state could not exclude a minority race from the voting franchise.[44] The White Primary Cases represent the premise that "all integral steps in an election for public office are public functions and therefore state action subject to some constitutional scrutiny."[45] In sum, these cases hold that "an election for public office is a public function and that any integral part of that function must conform to the Constitution."[46]

Some of the White Primary Cases involved elections by political parties for purposes of future general elections.[47] In *Grovey v. Townsend*,[48] the Court upheld a voting restriction based on race.[49] The Court noted that no state laws existed that governed state political parties, and the fact that the Texas Democratic Convention barred blacks from voting in its primaries did not constitute

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qual vestiges of slavery, also include the Thirteenth and Fourteenth Amendments. *See generally* NOWAK & ROTUNDA, *supra* note 36, § 14.7. The Thirteenth Amendment provides that "[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. CONST. amend. XIII, § 1. The Fourteenth Amendment was added partly to ensure that former slaves could become full U.S. citizens and to entitle them to due process and equal protection. U.S. CONST. amend. XIV, § 1. *See* NOWAK & ROTUNDA, *supra* note 36, § 14.7 at 642-43.

42. U.S. CONST. amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.").

43. *See, e.g.*, Gomillion v. Lightfoot, 364 U.S. 339 (1960) (involving a gerrymandered city district designed solely to fence out black voters from municipal boundaries and deny them the right to vote in city elections); Terry v. Adams, 345 U.S. 461 (1953) (involving a primary conducted by a private organization operating without the color of state aid, and excluding blacks from participation); Smith v. Allwright, 321 U.S. 649 (1944) (involving a party convention resolution forbidding blacks from voting in a party primary regulated by the state) [hereinafter White Primary Cases].

44. NOWAK & ROTUNDA, *supra* note 36, § 14.31 at 878.

45. NOWAK & ROTUNDA, *supra* note 36, § 14.33 at 896.

46. NOWAK & ROTUNDA, *supra* note 36, § 14.33 at 898.

47. *Terry*, 345 U.S. 461; *Allwright*, 321 U.S. 649.

48. 295 U.S. 45 (1935).

49. *Id.* at 55.

state action.[50] Less than a decade later, the Court overruled *Grovey*.[51]

In *Smith v. Allwright*,[52] the Court struck down a resolution that prohibited African-Americans from voting in a party primary regulated by the state.[53] The Court reasoned that when a state delegated to a political party the power to create voting qualifications, the state had in essence turned the party's action into state action.[54]

The Court broadened its analysis of racial requirements in elections in *Terry v. Adams*,[55] a case that involved a racially discriminatory primary held by a party operating without the color of state action.[56] The private primary was held for the purpose of excluding African-Americans prior to the Democratic primary.[57] The fact that the private party did not act under the color of state action did not seem to bother the Court. Writing for the majority, Justice Black held that the mere fact that a state allowed a private device—the racial bar to African-Americans—otherwise forbidden in a state election, violated the Fifteenth Amendment.[58]

In *Gomillion v. Lightfoot*,[59] the Court considered whether an Alabama statute that altered the shape of the city of Tuskegee from a square to a twenty-eight sided figure, effectively excluding some 400 black voters (but no white voters) from the city, violated the Fifteenth Amendment.[60] The Court, recognizing both the racial effect of and the purpose behind the law, held that it was unconstitutional.[61]

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50. *Id.* at 52-53.

51. *See Allwright*, 321 U.S. at 666.

52. 321 U.S. 649 (1944).

53. *Id.* at 656-57, 666.

54. *Id.* at 664-65 (stating that the constitutional "grant to the people of the opportunity for choice is not to be nullified by a State through casting its electoral process in a form which permits a private organization to practice racial discrimination in the election").

55. 345 U.S. 461 (1953).

56. *See id.* at 463.

57. *Id.* at 464.

58. *Id.* at 469.

59. 364 U.S. 339 (1960).

60. *Id.* at 340-41.

61. *Id.* at 347-48.

More recently, in *Shaw v. Reno*,[62] the Court considered whether North Carolina's legislative map for the election of members of Congress, which promoted the interests of minority voters, constituted an offense to the Fourteenth Amendment's equal protection clause.[63] The map created two congressional districts with African-American majorities, one of which was 160 miles long and, according to the majority, "no wider than the I-85 corridor."[64] In a five-four decision, the Court held that those opposing the gerrymandered districts had effectively made out a Fourteenth Amendment claim.[65] However, the Court stated that race-conscious decision-making may be permissible in certain circumstances.[66] For example, if the state had created reasonably compact second majority-minority districts that followed political subdivision lines, the district map may have withstood a Fifteenth Amendment challenge.[67] However, the mere fact that the state used race as the *only* criteria for one of the districts compelled strict scrutiny, the most heightened level of review, discussed in Part V.

Shaw represents a departure from traditional challenges to the voting franchise inasmuch as the Court gave greater weight to the Fourteenth Amendment's equal protection guarantee than to the facial constraints imposed by the Fifteenth Amendment.[68] Writing for the majority, Justice O'Connor implied that all Fifteenth Amendment challenges necessarily involve equal protection inquiries.[69] Indeed, Justice O'Connor crystallized the very meaning of the Fifteenth Amendment and its implicit equal protection guarantee as follows:

> Racial classifications of any sort pose the risk of lasting harm to our society. They reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin. Racial classifications with respect to voting carry particular dangers. Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us

62. 509 U.S. 630 (1993).
63. *Id.* at 633-34, 642.
64. *Id.* at 635.
65. *Id.* at 642.
66. *Id.*
67. *See id.* at 657.
68. *Id.* at 642.
69. *Id.*

> further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire.[70]

It is quite clear, then, that the Fifteenth Amendment acts as a complete bar to using race as a condition of voting. The amendment's evolution over the last century demonstrates the Court's progression toward extinguishing the socio-political indignities that characterized the Civil War era. While the Fifteenth Amendment is both expressly clear and unambiguous in its language, we shall see instances where the Court, and Congress, have carved out exceptions to the voting franchise.

B. *Interested Voters: The Special Purpose Election*

While four constitutional amendments place restrictions on the ability of states to impose conditions on the voting franchise,[71] the Supreme Court originally interpreted the U.S. Constitution to suggest that states possess an inherent constitutional authority to control the electoral process.[72]

For instance, despite the Fifteenth Amendment's blanket prohibition against using race as a condition of voting, the Supreme Court has suggested that a state might legitimately limit an election to interested voters and restrict the electorate to only those citizens on whom the election would have a disproportionate impact.[73]

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70. *Id.* at 657.

71. Specifically, the Fifteenth, Nineteenth, Twenty-Fourth and Twenty-Sixth Amendments. *See supra* notes 38-42 and accompanying text.

72. *See generally* NOWAK & ROTUNDA, *supra* note 36, § 14.31. Article I, Section 2 of the Constitution requires electors for members of the House of Representatives to meet the same qualifications as "[e]lectors of the most numerous Branch of the State Legislature." U.S. CONST. art. I, § 2. Article II, Section one, along with the Twelfth and Twentieth Amendments, lay out the process for electing the President and Vice President. U.S. CONST. art. II, § 1. Specifically, states are given discretion in the manner of selecting the members of the Electoral College. *Id.* Article II, Section 1 states, in pertinent part:

> Each state shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

Id.

73. *See, e.g.*, Kramer v. Union Free Sch. Dist., 395 U.S. 621 (1969).

In *Salyer Land Co. v. Tulare Lake Basin Water Storage District*,[74] residents of a California water storage district challenged the constitutionality of a voter qualification that allowed only landowners to vote in storage district elections.[75] The Court permitted the voting scheme for officers of the water storage district, limited as it was to landowners, with each vote cast assessed proportionately to the value of the landowner's land.[76] Taking a more circumscribed view of the election's "purpose," the Court found that the water storage district possessed limited authority, providing "no other general public services such as schools, housing, transportation, utilities, roads, or anything else of the type ordinarily financed by a municipal body."[77]

The Court explained its "disproportionate" impact theory, noting "[n]ot only does the district not exercise what might be thought of as 'normal governmental' authority, but its actions disproportionately affect landowners."[78]

Thus, in *Salyer* and its progeny,[79] the Court has articulated an exception to state-imposed conditions on voting where the election being held has a limited purpose which disproportionately impacts a particular group. In such a case, the franchise may be limited to that group. These exceptions expressly divorce from their operation the "one person, one vote" mandate of the Fourteenth Amendment.[80]

It is important to note that the "special purpose election" exception has not, so far, been applied in instances where the group on whom an election disproportionately impacts is a racially distinct class. The definitional character of the electorate in "special purpose elections" has to do only with ownership of real property.

III. ALOHA: WELCOME TO AMERICA—HISTORY

By 500 A.D., large bands of Polynesians from the South Pacific

74. 410 U.S. 719 (1973).
75. *Id.* at 724-25.
76. *Id.* at 729.
77. *Id.* at 728-29.
78. *Id.* at 729.
79. *See* Ball v. James, 451 U.S. 355 (1981); Hill v. Stone, 421 U.S. 289 (1975).
80. *See* Rice v. Cayetano, 528 U.S. 495, 522 (2000).

had reached and settled in Hawaii.[81] Over the following centuries, the Hawaiian way of life developed a sophisticated governmental structure, a distinct social organization, and an economic system largely characterized by wealthy chieftains who presided over feudal holdings.[82] The U.S. Congress has stated that "prior to the arrival of the first Europeans in 1778, the Native Hawaiian people lived in a highly organized, self-sufficient, subsistent social system based on communal land tenure with a sophisticated language, culture, and religion."[83]

When Captain Cook made landfall in the Sandwich Islands in 1778, at the same time the American colonies were fighting for their own independence 5,000 miles away, the Native Hawaiian population exceeded 300,000.[84] At this time, there existed in Hawaii "a feudal type of land ownership system" in which "tenants were considered to have 'rights' with respect to the land."[85]

In 1893, the Kingdom of Hawaii was overthrown with the aid of American forces.[86] An interim government known as the Republic of Hawaii was set up in opposition to the Hawaiian government under Hawaii's last ruler, Queen Lili'uokalani.[87] The Republic, eager for Hawaii to join American statehood, ceded 1,800,000 acres of crown, government, and public lands to the United States "without the consent of or compensation to the Native Hawaiian people . . . or their sovereign government."[88]

As part of the Hawaii Admission Act,[89] the United States required Hawaii to adopt the Hawaiian Homes Commission Act of 1920 ("HHCA"),[90] which set aside certain lands for the "rehabilitation of Native Hawaiians."[91] Specifically, under the provisions of the HHCA, the United States returned to Hawaii 200,000 acres

81. KUYKENDALL & DAY, *supra* note 9, at 5.

82. *Id.* at 7.

83. Apology Resolution, 107 Stat. at 1510.

84. Brief of Amici Curiae The Hou Hawaiians and Maui Loa Native Hawaiian Beneficiaries at 5, Rice v. Cayetano, 528 U.S. 495 (2000) (No. 98-818).

85. *Id.*

86. *See* Apology Resolution, 107 Stat. at 1510; *see also* KUYKENDALL & DAY, *supra* note 9, at 177-78.

87. *See* KUYKENDALL & DAY, *supra* note 9, at 174-79.

88. Apology Resolution, 107 Stat. at 1512.

89. Hawaii Admission Act of 1959, Pub. L. No. 86-83, 73 Stat. 4 (1959).

90. Hawaiian Homes Commission Act of 1920, ch. 42, 42 Stat. 108 (1921). The HHCA is incorporated into section 4 of the Hawaii Admission Act. Hawaii Admission Act § 4.

91. Rice v. Cayetano, 963 F. Supp. 1547, 1551 (D. Haw. 1997).

of the 1,800,000 acres originally ceded for the betterment of Native Hawaiians[92] "[a]s a compact with the United States relating to the management and disposition of [those lands]."[93] The United States required Hawaii to incorporate the HHCA into its own state constitution.[94] In addition, Congress conveyed to Hawaii the bulk of the other lands ceded to the United States in 1898 and required that Hawaii hold the lands in a "public trust" for "the betterment of the conditions of Native Hawaiians, as defined in the [HHCA]."[95] Under the HHCA, "Native Hawaiian" was defined to include "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778."[96]

The legislative history behind the HHCA makes clear that Congress likened Native Hawaiians to Indian tribes by declaring that "previous enactments granting [American] Indians . . . special privileges in obtaining and using public lands" justified the HHCA.[97] Congress has also stated that "[i]n recognition of the *special relationship* which exists between the United States and the Native Hawaiian people, [it] has extended to Native Hawaiians the same rights and privileges accorded to American Indian, Alaska Native, Eskimo, and Aleut communities."[98]

In 1978, Hawaii amended its constitution to establish the OHA to better "address the needs of the aboriginal class of people of Hawaii."[99] By statute, the OHA was charged with using twenty percent of the proceeds from the 1,800,000 acres returned to Hawaii under the Admission Act solely for the benefit of Native Hawaiians.[100]

The amendment gave the OHA the power to administer the resulting trust.[101] The amendment also required that all officers of the OHA be "Hawaiians" and that only "Hawaiians," as defined

92. *See* Hawaiian Homes Commission Act § 203.
93. Hawaii Admission Act § 4.
94. *Id.*
95. *Id.* §§ 5(b), (f).
96. Hawaiian Homes Commission Act § 201(7) (omitted from 48 U.S.C. § 691 in light of Hawaii's admission into Union).
97. H.R. REP. NO. 66-839, at 11 (1920).
98. Native Hawaiian Education Act, 20 U.S.C. § 7902(13) (1994) (emphasis added).
99. HAW. REV. STAT. § 10-1(a) (1993).
100. *See id.* §§ 10-3(1), -13.5 (1993).
101. HAW. CONST. art. XII, § 6.

by the law, would be allowed to vote for the OHA trustees.[102] The term "Hawaiian" was added to bring state law "in line with the current federal policy of the Federal government to extend benefits for Hawaiians to all Hawaiians *regardless of blood quantum*."[103]

IV. THE CASE

A. *Procedural History*

1. The District Court

Rice, who is no more a "Native Hawaiian" than the "descendants of Miles Standish are American Indians,"[104] sued Hawaii in

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102. *Id.* See *supra* note 5 for the statutory definitions of "Hawaiian" and "Native Hawaiian."

103. 16 U.S.C. § 470w(17) (1994) (emphasis added); *see, e.g.*, Apology Resolution, 107 Stat. at 1513. Congress has enacted a myriad of laws that classify Native Hawaiians as Native Americans and include them in Native American benefit programs. *See, e.g.*, Workforce Investment Act of 1998, 29 U.S.C. § 2911 (Supp. 1998) (regarding employment programs for Native Hawaiians and other Native Americans); Drug Abuse Prevention, Treatment, and Rehabilitation Act, 21 U.S.C. § 1177(d) (1994) (giving preferences to potential grantees—this law is targeted to fight drug abuse among Native Americans, which under this law includes Native Hawaiians); National Historic Preservation Act, 16 U.S.C. § 470a(d)(6) (1994) (providing protection to properties with cultural and religious importance to Indian tribes and Native Hawaiians); National Museum of the American Indian Act, 20 U.S.C. §§ 80q to 80q-12, 80q-14 (1994) (requiring the return of Native Hawaiian human remains and funerary objects, as well as the creation of a museum exclusively for the preservation and study of the history and artifacts of Native Americans, a group of individuals statutorily defined to include Native Hawaiians); Native Hawaiian Education Act, 20 U.S.C. §§ 7901-7912 (1994) (aimed at facilitating the education of Native Hawaiians); Native American Languages Act, 25 U.S.C. §§ 2901-2906 (1994) (including Native Hawaiian languages in the group of Native American languages accorded statutory protection); Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001-3013 (1994) (requiring the return of Native Hawaiian Human remains and funerary objects); 42 U.S.C. § 254s (1994) (providing for health care scholarships for Native Hawaiian students); American Indian Religious Freedom Act, 42 U.S.C. § 1996 (1994) (promising to preserve Native Hawaiian religious beliefs as a subset of religions described in the statutory heading as "Native American"); Native American Programs Act of 1974, 42 U.S.C. §§ 2991-2992 (1994) (including Native Hawaiians in an array of Native American financial and benefit programs); Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act of 1970, 42 U.S.C. § 4577(c)(4) (1994) (giving preferences to applications targeted at fighting drug abuse among Native Hawaiians and other Native Americans); Native Hawaiian Health Care Improvement Act, 42 U.S.C. §§ 11701-11714 (1994) (facilitating the improvement of health care for Native Hawaiians); Cranston-Gonzalez National Affordable Housing Act, Pub. L. No. 101-625, § 958, 104 Stat. 4079, 4422-23 (1990) (giving preferences for Native Hawaiians in HUD housing assistance programs).

104. Respondent's Brief at 11, Rice v. Cayetano, 528 U.S. 495 (2000) (No. 98-818).

the United States District Court for the District of Hawaii,[105] claiming the OHA voting scheme violated both the Fourteenth and Fifteenth Amendments of the U.S. Constitution.[106]

The district court upheld Hawaii's voting scheme, relying in large measure on the Supreme Court's decision in *Morton v. Mancari*[107] and its progeny.[108] The district court applied rational basis review to Hawaii's voting law, reasoning that the law would not violate the Constitution if it was rationally tied to the fulfillment of the unique obligation to the Native Hawaiians.[109]

In *Mancari*, non-Indian employees of the Bureau of Indian Affairs ("BIA") challenged its hiring preference, which was designed to give Native Americans greater participation in their own self-government.[110] The plaintiffs in *Mancari* argued that the preference violated the anti-discrimination provisions of the Equal Employment Opportunity Act of 1972.[111] The Supreme Court rejected their argument, finding that there is "a special relationship" between the United States and the Indian tribes, and that the plenary power of Congress to legislate with respect to the tribes is found in the Indian Commerce Clause of the United States Constitution.[112]

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105. *Rice*, 528 U.S. at 510.

106. *Id.*

107. 417 U.S. 535 (1974).

108. *See, e.g.*, County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985); Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979); Washington v. Confederated Bands & Tribes of the Yakima Indian Nation, 439 U.S. 463 (1979); Delaware Tribal Bus. Comm. v. Weeks, 430 U.S. 73 (1977); N. Cheyenne Tribe v. Hollowbreast, 425 U.S. 649 (1976); Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463 (1976); Rupert v. United States Fish & Wildlife Serv., 957 F.2d 32, 34-35 (1st Cir. 1992) (per curiam).

109. *See* Rice v. Cayetano, 963 F. Supp. 1547 (D. Haw. 1997).

110. *See* Morton v. Mancari, 417 U.S. 535, 538-39 (1974).

111. *Id.* The operative provision of the Equal Employment Act is found at 42 U.S.C. § 2000e-16(a) (1994).

112. *Mancari*, 417 U.S. at 551-52. The Indian Commerce Clause provides that "[t]he Congress shall have the power . . . [t]o regulate commerce . . . with the Indian tribes." U.S. CONST. art. I, § 8, cl. 3. The *Mancari* Court also identified the treaty making power as another source of the federal government's power over Indian affairs. *See Mancari*, 417 U.S. at 552. The Treaty Clause reads, "[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties." U.S. CONST. art. II, § 2, cl. 2. *But see* Philip P. Frickey, *Adjudication and Its Discontents: Coherence and Conciliation in Federal Indian Law*, 110 HARV. L. REV. 1754, 1761 (1997) ("I have suggested that . . . the Court implicitly embraced the notion that power over Indian affairs is an unwritten, inherent power of national sovereignty necessitated by the colonial nature of the United States.").

While acknowledging that Native Hawaiians do not enjoy the same "special relationship" with the federal government as Indian tribes, the district court drew a parallel between the status of Native Americans and the "trust relationship" Congress impliedly created with the Native Hawaiians under the HHCA.[113] Thus, the district court reasoned, *Mancari* controlled since the preferential classifications in *Mancari* and *Rice*, while facially race-based, were actually rooted in legal or political status.[114]

Rice argued that *Mancari* did not apply since Native Hawaiians are not an organized tribe, but simply a racial class.[115] As such, he argued that the state of Hawaii could not create a tribe among the "Native Hawaiians" and "invest it with powers of self-government."[116] In making this argument, which the Supreme Court would later find compelling,[117] Rice relied on *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*,[118] in which the Court held that only the federal government had the power to enact legislation singling out Indians for preferential treatment and that the states do not enjoy the same unique relationship with the Indians.[119]

Noting that legislation based upon racial classifications is constitutionally suspect under the Equal Protection Clause and should be viewed under strict scrutiny,[120] the district court pointed out that, where Native Americans are concerned, the Su-

113. *See Rice*, 963 F. Supp. at 1552-53; *see also* Keaukaha-Panaewa Cmty. Ass'n v. Hawaiian Homes Comm'n, 739 F.2d 1467, 1472 (9th Cir. 1984) (noting that Congress owes the Native Hawaiians a "trust obligation" as a "compact with the United States").

114. *See Rice*, 963 F. Supp. at 1554.

115. *Id.* at 1549.

116. *Id.* at 1555.

117. *See* Rice v. Cayetano, 528 U.S. 495, 518-22 (2000).

118. 439 U.S. 463 (1979).

119. *Id.* at 500-01. Actually, the Court in *Yakima*, while recognizing that states generally do not have the same special relationship with Indians that the federal government has, nonetheless concluded that because the state law at issue was enacted "in response to a federal measure" intended to achieve the result accomplished by the challenged state law, the state law itself need only "rationally furthe[r] the purpose identified by the State." *Id.* (quoting Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 314 (1976) (per curiam)).

120. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 235 (1995) (holding that all governmental programs with race-based preferences designed to benefit minorities, including Native Americans, must be subject to strict scrutiny). As discussed *infra* Part V, strict scrutiny requires that the government show that a particular law is narrowly tailored to achieve the compelling interest asserted.

preme Court has applied the more relaxed rational basis analysis.[121] To pass strict scrutiny analysis, a program must serve a compelling state interest and must be narrowly tailored to achieve that interest.[122] Under the more lenient rational basis test, however, a state program need only be rationally tied to the advancement of an asserted governmental interest.[123]

The court cited *Adarand Constructors, Inc. v. Pena*,[124] a landmark decision in which the Supreme Court held that all government programs with race-based preferences would be subject to strict scrutiny.[125] *Adarand* led some commentators to conclude that all legislation designed to benefit Native Hawaiians would face strict scrutiny in equal protection challenges.[126] Finding the status of Native Hawaiians equivalent to that of Native American tribes, however, the district court applied rational basis review and concluded there was a rational relation between the OHA voting scheme and Hawaii's interest in using revenues from the OHA-administered land trust for the improvement of Native Hawaiians.[127]

Thus, the district court found that Hawaii had simply limited the electoral franchise to the beneficiaries of the OHA's programs—the indigenous people who were the subjects of the trust obligation.[128] More specifically, the district court held that the OHA was enacted in response to federal legislation designed to improve the lives of Native Hawaiians and that the OHA's voting provisions were passed pursuant to the HHCA.[129] The district court concluded that Hawaii "had merely enacted a reasonable

121. *Rice*, 963 F. Supp. at 1550; *see also* Morton v. Mancari, 417 U.S. 535, 555 (1974) (holding that with respect to Native American tribes, race-conscious legislation is valid under the less stringent rational basis test).

122. *See, e.g., Adarand*, 515 U.S. at 235; City of Richmond v. J.A. Croson Co., 488 U.S. 469, 505 (1989).

123. *See Rice*, 528 U.S. at 531-32 (citing Morton v. Mancari, 417 U.S. 535, 554-55 (1974)).

124. 515 U.S. 200 (1995).

125. *Id.*

126. *See* Benjamin, *supra* note 19. *But cf.* Frickey, *supra* note 112; Van Dyke, *supra* note 19.

127. *See Rice*, 963 F. Supp. at 1555.

128. *Id.*

129. *Id.* Consequently, the legislation would be upheld if it could be tied rationally to the fulfillment of the federal government's unique obligation to Native Hawaiians. *Id.*

method to satisfy its obligation to utilize a portion of the [revenues] . . . for the betterment of Native Hawaiians."[130]

2. The Ninth Circuit

In a less exhaustive opinion, the Ninth Circuit affirmed the district court's ruling.[131] The circuit court likewise reasoned that if the land trust was properly set aside for Native Hawaiians, the state properly established the OHA to administer the trust, and the OHA was governed by trustees whose members were Hawaiian, it followed that the state might rationally conclude that Hawaiians, as the group to whom the trust obligations ran, should be the group to elect the trustees.[132]

The circuit court further held that even if *Adarand* applied, the OHA voting scheme would survive strict scrutiny because the classification was based on the "special trust relationship" between Hawaii and the Native Hawaiians.[133] However, the court found that *Adarand* did not apply for two reasons: first, the OHA voter restriction was not primarily racial in context, and second, the eligibility requirement in *Rice* was not a preference of the sort at issue in *Adarand*.[134]

The court seemed to construe *Adarand* as a narrowly held affirmative action decision, not of the sort that should control in *Rice*. Rather, the Ninth Circuit viewed the OHA voting restriction as analogous to the landowner limitation at issue in *Salyer Land Co. v. Tulare Lake Basin Water Storage District*.[135] As discussed in Part II.B., the *Salyer* line of cases are referred to as "special purpose district" cases in which courts have upheld voting limitations applied to groups on whom a particular election has a disproportionate impact when compared to the population at large.[136]

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130. *Id.*

131. *See* Rice v. Cayetano, 146 F.3d 1075, 1076 (9th Cir. 1998), *rev'd*, 528 U.S. 495 (2000).

132. *Id.* at 1079.

133. *Id.* at 1082.

134. *Id.*

135. *Id.* (citing Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719 (1973)).

136. *Salyer*, 410 U.S. at 733. In *Salyer*, the Supreme Court upheld a voter qualification statute which restricted voting to landowners only and apportioned voting power for direc-

3. The Supreme Court

a. The Majority Opinion

Thus, twice defeated, Rice appealed to the Supreme Court.[137] The plight of Native Hawaiians was far from settled.[138] In light of the fact that no other state program resembled Hawaii's, the case raised broad questions about making race a condition of eligibility for public benefits.[139] There were, of course, issues of great moment and difficulty with which the Court could grapple, not the least being whether the Court would view *Rice* through the lens of *Adarand* and apply strict scrutiny, or whether *Rice* should be decided as a "special purpose district" case of the sort in *Salyer*.[140] Interestingly, the Court chose neither path.

Rather than squarely evaluate the merits of Rice's claims, the Court took steady aim at Hawaii's three principal defenses of its voting law and rejected each one.[141] The majority avoided analyzing the case under the Fourteenth Amendment's equal protection guarantee, an approach that could have had much broader implications for government programs that confer benefits on the basis of race.[142] Instead, the Court viewed the OHA voting scheme as an affront to the Fifteenth Amendment, holding that there is no such thing as benign discrimination.[143]

The Court announced that it would not decide whether Congress may treat Native Hawaiians as it does Indian tribes, referring to such a consideration as "difficult terrain."[144] Moreover, the Court rejected the relevance of *Mancari*, holding that to extend *Mancari* to *Rice* would be to say that Congress could authorize a state to create a voting scheme limiting an electorate for its pub-

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tors of the water district upon the assessed valuation of the landowner's property. *Id.* at 724-25, 733.

137. *Rice v. Cayetano*, 528 U.S. 495, 511 (2000).

138. *Compare* Van Dyke, *supra* note 19, *with* Benjamin, *supra* note 19.

139. *See* Greenhouse, *supra* note 14.

140. *Id.*

141. *Rice*, 528 U.S. at 517-23.

142. By deciding the case solely under the Fifteenth Amendment, the Court avoided having to determine whether *Adarand* mandated that strict scrutiny be applied in all cases where race is used as a pretext for preferential treatment in government programs.

143. *See* Linda Greenhouse, *Justices Void Hawaii Setup That Limits a Vote by Race*, N.Y. TIMES, Feb. 24, 2000, at A16.

144. *Rice*, 528 U.S. at 519.

lic officials to a racial class, to the exclusion of all non-members of that class.[145] At the core of the Court's analysis was the fact that the non-Indian plaintiffs in *Mancari* were ineligible for the Bureau's hiring preferences not because they were non-Indian, but because they were not part of a "quasi-sovereign" tribe that enjoyed a "special trust relationship" with the federal government.[146] The OHA elections, by contrast, were an affair of the State of Hawaii.[147] Thus, "[t]he validity of the voting restriction [was] the only question before" the Court.[148] It concluded that to apply *Mancari* to *Rice* would essentially permit a state to "fence out whole classes of its citizens from decision making in critical state affairs."[149]

The Court wasted no time dispensing with Hawaii's claim that the OHA voting scheme was sustainable under the line of "special purpose districts" cases such as *Salyer*.[150] The Court held that the *Sayler* decision did not suggest that compliance with the one person-one vote requirement of the Fourteenth Amendment excused compliance with the Fifteenth Amendment.[151] In other words, *Salyer* did not implicate the Fifteenth Amendment.

Turning to Hawaii's final argument—that the voting restriction did no more than ensure an alignment of interests between fiduciaries and beneficiaries of a trust and that the restriction was not based on race—the Court pointed out that while the revenues from the trust were statutorily designated for "Native Hawaiians," both Native Hawaiians and Hawaiians were allowed to vote.[152] The Court concluded that the restriction *created* rather than eliminated a differential alignment between the trustees and the so-called beneficiaries.[153] The majority held that Hawaii's argument foundered on even more basic grounds, namely the unconstitutional premise that citizens of a particular race are more qualified to vote on certain matters than others.[154]

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145. *Id.* at 520.
146. *Id.* (quoting Morton v. Mancari, 417 U.S. 535, 554 (1974)).
147. *Id.*
148. *Id.* at 521.
149. *Id.* at 522.
150. *Id.*
151. *Id.*
152. *Id.* at 523.
153. *Id.*
154. *Id.*

b. The Concurrence

Justices Breyer and Souter concurred in the result,[155] finding that Hawaii's argument failed on two grounds: first, there was no "trust" for Native Hawaiians, and second, the electorate, as defined by statute, did not constitute a "tribe."[156] To accept that a trust existed under the Hawaii Admission Act, one had to recognize its clear language, which required that revenues from the ceded lands were to benefit *all* Hawaiians *as well as* for the "betterment" of those who are native.[157] Justice Breyer argued that the OHA electorate, as defined by statute, accommodated far too many groups to constitute anything analogous to a tribe.[158] Justice Breyer made light of the fact that the actual provision defining the class benefitting from the trust came from the HHCA.[159] Justice Breyer also pointed out that the OHA was simply a special purpose branch of the state government, and thus, the Fifteenth Amendment applied.[160]

c. The Dissent

Relying on three principles, Justices Stevens and Ginsburg argued that the OHA voting provision did not violate either the Fourteenth or the Fifteenth Amendment.[161] "First, the Federal Government must be, and has been, afforded wide latitude in carrying out its obligations arising from the special relationship it has with the aboriginal peoples, a category that includes the native Hawaiians."[162] In addition, Justice Stevens argued that there existed a fiduciary responsibility arising from the establishment of a public trust for administering assets granted to it by the fed-

155. *Id.* at 524 (Breyer, J., concurring).

156. *Id.* at 525 (Breyer, J., concurring).

157. *See* HAW. CONST. art. XII, §§ 1-3; *Rice*, 528 U.S. at 525 (Breyer, J., concurring).

158. *Rice*, 528 U.S. at 526 (Breyer, J., concurring).

159. *See id.* at 525 (Breyer, J., concurring). For the definitions at issue in *Rice*, see *supra* notes 95, 101, and accompanying text.

160. *Id.* at 526 (Breyer, J., concurring).

161. *Id.* at 527 (Stevens, J., dissenting).

162. *Id.* at 529 (Stevens, J., dissenting). The dissent points out that there are more than 150 laws passed by Congress that recognize Native Hawaiians as Native Americans. "By classifying native Hawaiians as 'Native Americans' for purposes of these statutes, Congress has made clear that native Hawaiians enjoy many of 'the same rights and privileges accorded to the American Indian, Alaska Native, Eskimo, and Aleut communities.'" *Id.* at 533-34 (Stevens, J., dissenting) (quoting 42 U.S.C. § 11701(19) (1994)).

eral government for the benefit of Native Hawaiians.[163] Finally, "there [was] simply no invidious discrimination present in [Hawaii's] effort to see that indigenous peoples [were] compensated for past wrongs."[164]

Looking squarely to the Court's analysis in *Mancari*, Justice Stevens rejected the majority's application of strict scrutiny.[165] He argued instead that, when it comes to the exercise of Congress's plenary power in Indian affairs, the Court has on numerous occasions applied rational basis review when dealing with legislation involving Indian preferences.[166]

With respect to whether Native Hawaiians may be viewed as a "tribe," Justice Stevens suggested only that it would be ironic "to conclude that native Hawaiians are not entitled to special benefits designed to restore a measure of native self-governance because they currently lack any vestigial native government—a possibility of which the history and the actions of this Nation have deprived them."[167]

Justice Stevens rejected the majority's view that Congress did not have the authority to delegate to the states the power to devise a voting scheme such as the OHA's.[168] He relied on *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*,[169] in which the Court held that a state law involving preferential treatment of Indians enacted in response to a federal measure needed only to "'rationally further the purpose identified by the State.'"[170] Since the OHA voting scheme was merely intended to implement the wishes of the federal government, it necessarily survived the rational basis review by promoting the self-government of Native Hawaiians.[171]

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163. *Id.* at 529 (Stevens, J., dissenting).

164. *Id.* (Stevens, J., dissenting).

165. *See id.* at 534 (Stevens, J., dissenting).

166. *Id.* at 531-32 (Stevens, J., dissenting) (stating that "as 'long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation towards the Indians, such legislative judgments will not be disturbed'") (quoting Morton v. Mancari, 417 U.S. 535, 545-55 (1974)).

167. *Id.* at 535 (Stevens, J., dissenting).

168. *Id.* at 537 (Stevens, J., dissenting).

169. 439 U.S. 463 (1979).

170. *Rice,* 528 U.S. at 537 (Stevens, J., dissenting) (quoting Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 314 (1976) (per curiam)); *see also Yakima*, 439 U.S. at 500-501.

171. *Rice,* 528 U.S. at 538 (Stevens, J., dissenting).

Justice Stevens rejected Rice's Fifteenth Amendment challenge by arguing that while "[a]ncestry can be a proxy for race,"[172] one might also conclude that one's ancestry does not necessarily determine one's apparent or acknowledged race today.[173] The OHA eligibility requirement was a function of lineal descent, not the blood-based characteristics of a particular Hawaiian resident.[174]

V. BEHIND RICE'S LEGAL CURTAIN

Viewed broadly, the body of law concerning Native Hawaiians and Native Americans generally involves two approaches: one emphasizing the linkage between law and deprivation,[175] and another, more optimistic approach, focusing on tribal survival.[176] The law/deprivation approach is perhaps best demonstrated in *Johnson v. McIntosh*,[177] the early landmark decision in which Chief Justice John Marshall held that the "discovery" of North America meant the "conquest" of North America, and consequently, the law of the conqueror prevailed over the law of the conquered.[178]

Alternatively, the "tribal survival" approach is most clearly reflected in cases such as *Mancari*. The *Mancari* decision recognized the basic historical truth that now, over five centuries since Europeans first made contact with what is now the continental United States, and more than two centuries since the West began its incursion into Hawaii, colonization remains incomplete.[179] The federal government today recognizes more than 500 Native American tribes,[180] according them a variety of self-governmental powers.[181]

Like the civil rights cases of the 1950s and 1960s, there is a

172. *Id.* at 514.
173. *Id.* at 539 (Stevens, J., dissenting).
174. *Id.* at 541 (Stevens, J., dissenting).
175. *See* Frickey, *supra* note 112, at 1754-55.
176. *See id.* at 1755.
177. 21 U.S. (8 Wheat.) 543 (1823).
178. *See id.* at 588-91.
179. *See, e.g.*, L. Scott Gould, *The Congressional Response to* Duro v. Reina: *Compromising Sovereignty and the Constitution*, 28 U.C. DAVIS L. REV. 53, 58 (1994).
180. *Id.*
181. *See, e.g.*, United States v. Wheeler, 435 U.S. 313, 323-26 (1978).

remedial element inherent in Native American law.[182] It seems clear, for instance, that the courts and Congress have come a long way from Marshall's "divide and conquer" holding in *Johnson.* Indian tribes have retained elements of "quasi-sovereign" authority ever since they ceded their lands to the United States and announced their dependence on the federal government.[183] As recognized citizens and residents of the United States, Indians are endowed with the rights, privileges, and immunities equal to those enjoyed by all other U.S. citizens.[184] Moreover, Indians are given special preference for certain types of employment,[185] and Congress has enacted legislation to ensure maximum Native American participation in educational services and other programs benefitting Indian communities so the needs of Native Americans will be met more immediately.[186]

A. *The Special Relationship Doctrine*

The United States Constitution allocates to Congress the plenary power to legislate with respect to Indian affairs.[187] As early as *Johnson v. McIntosh,*[188] the Court defined "Indians" or "tribes" as "original inhabitants" or "natives"[189]—that is, those indigenous people inhabiting the New World before the arrival of the first Europeans. Thus, since the beginning of North American colonization, the "federal power to regulate and protect the Indians and their property . . . has been recognized."[190]

Congress's plenary power to legislate with respect to Indians, or Native Americans, derives from at least four constitutional

182. Native Americans have been accorded numerous preferences over other American citizens. *See generally* Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979) (granting tribe preferential fishing rights); Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation, 425 U.S. 463 (1976) (granting tribes immunity from state taxation); Antoine v. Washington, 420 U.S. 194 (1975) (granting tribe preferential hunting rights).

183. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

184. *See* Acosta v. County of San Diego, 272 P.2d 92, 98 (Cal. Ct. App. 1954).

185. *See* Morton v. Mancari, 417 U.S. 535 (1974).

186. *See* 25 U.S.C. § 450a (1994).

187. *See* Alaska v. Native Vill. of Venetie Tribal Gov't, 522 U.S. 520, 531 n.6 (1998); United States v. Wheeler, 435 U.S. 313, 319 (1978); *Mancari,* 417 U.S. at 551-552.

188. 21 U.S. (8 Wheat.) 543 (1823).

189. *Id.* at 572-74.

190. Bd. of County Comm'rs v. Seber, 318 U.S. 705, 715 (1943).

clauses: the Indian Commerce Clause,[191] the Treaty Clause,[192] the Property Clause,[193] and the Debt Clause.[194] As the Court in *Mancari* noted, "[t]he plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself."[195] The *Mancari* Court echoed the Court's insistence three decades prior that Congress's wide authority to govern Indian affairs "cannot be doubted."[196]

Indeed, today an entire title of the United States Code—Title 25—is devoted to "Indians," and in virtually every other title of the Code, Indians and other North American "natives" are singled out for special treatment in all manner of areas.[197]

While there is no legal duty incumbent upon Congress to redress the wrongs committed by the West against the Indians, the Supreme Court has steadfastly held that the federal government may make amends as its judgment dictates.[198] Underscoring the Court's view that the judiciary should take an active role in remediation efforts toward Indians for past wrongs, Justice Jackson, concurring in *Northwestern Bands of Shoshone Indians v. United States*,[199] wrote:

> The generation of Indians who suffered the privations, indignities, and brutalities of the westward march of the whites have gone to the Happy Hunting Ground, and nothing that we can do can square the account with them. Whatever survives is a moral obligation resting on the descendants of the whites to do for the descendants of the Indians what in the conditions of this twentieth century is the decent thing.[200]

While it is true that both Congress and the Court have referred

191. U.S. CONST. art. I, § 8, cl. 3; *see, e.g.*, *Venetie*, 522 U.S. at 531 n.6.

192. U.S. CONST. art. II, § 2, cl. 2; *see, e.g.*, McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 172 n.7 (1973).

193. U.S. CONST. art IV, § 3, cl. 2; *see, e.g.*, United States v. Kagama, 118 U.S. 375, 379-80 (1886).

194. U.S. CONST. art I, § 8, cl. 1; *see, e.g.*, United States v. Sioux Nation of Indians, 448 U.S. 371, 397 (1980).

195. *Mancari*, 417 U.S. at 551-52.

196. Board of Comm'rs of Creek County v. Seber, 318 U.S. 705, 715 (1943).

197. *See, e.g.*, Native Hawaiian Education Act, 20 U.S.C. § 7902(13) (1994).

198. *See* Northwestern Bands of Shoshone Indians v. United States, 324 U.S. 335 (1945).

199. 324 U.S. 335 (1945).

200. *Id.* at 355 (Jackson, J., concurring).

to the Native American Indians in terms of race,[201] the Court has nevertheless held that its decisions "leave no doubt that federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications."[202] To be sure, the Court has never suggested that legislation with preferences for Indians are "race-based" within the meaning of the Civil War Amendments. Put simply, the mere fact that the Thirteenth, Fourteenth and Fifteenth Amendments have not, since their adoption, circumscribed Congress's plenary power to legislate in Indian affairs begs the conclusion that the term "raced-based" has nothing at all to do with race within the meaning of those amendments.

In fact, the Court, in *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, expressly held that "the argument that [Indian] classifications are 'suspect' [is] an untenable one."[203] As of now, the Court's position that racial classifications expressing a preference for Indians are not suspect has remained nothing short of unshakeable.

Or has it, in light of *Rice*? Before turning to the probable impact of the *Rice* decision, discussed in Part VI, it is helpful to explore the implications of the Court's unwillingness to consider whether Congress may treat Native Hawaiians as it does the Indian tribes.

First, the Court's refusal to consider whether Native Hawaiians enjoy a "special relationship" with the federal government is disingenuous at best. The Court, after all, suggested that Native Hawaiians *may* "have a status like that of Indians in organized tribes, and that [Congress] may, and has, delegated to the State a broad authority to preserve that status."[204] As Justice Breyer

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201. *See, e.g.*, United States v. Candelaria, 271 U.S. 432, 442 (1926) ("'Indian tribe . . . [refers to] a body of Indians of the same or similar *race*.'" (emphasis added) (quoting Montoya v. United States, 180 U.S. 261, 266 (1992))); United States v. Rogers, 45 U.S. (4 How.) 567, 573 (1846) (tribe "does not speak of members of a tribe, but of the *race* generally,—of the family of Indians" (emphasis added)).

202. United States v. Antelope, 430 U.S. 641, 645 (1977).

203. 439 U.S. 463, 501 (1979). For more on the Court's insistence that racial classifications with respect to Indians are not "suspect" or "impermissible," see Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 673 n.20 (1979); *Yakima*, 439 U.S. at 500-02; *Antelope*, 430 U.S. at 645-46; Delaware Tribal Bus. Comm. v. Weeks, 430 U.S. 73, 85-90 (1977); Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463, 479-80 (1976); Fisher v. Dist. Court, 424 U.S. 382, 390-91 (1976).

204. Rice v. Cayetano, 528 U.S. 495, 518 (2000).

noted glibly in his concurrence, "[the Court] assumes without deciding that the State could 'treat Hawaiians or native Hawaiians as tribes.'"[205]

The silent assumption to which Justice Breyer referred finds ample support in the fact that Congress has enacted a myriad of laws recognizing a special relationship between the federal government and the Native Hawaiians.[206] If indeed the majority placed the cart before the horse—that is, decided the case in advance of any meaningful consideration of Native Hawaiians' status—the horse, then, is most certainly the laws referenced above. The majority's silence on this issue clearly ignores the reality the Ninth Circuit recognized: the OHA voting restriction

> is rooted in historical concern for the Hawaiian race, going back at least to the [HHCA], carried through statehood when Hawaii acknowledged a trust obligation toward Native Hawaiians as a condition of admission to the union, and on to 1993, when Congress passed a Joint Resolution "apologiz[ing] to Native Hawaiians on behalf of the people of the United States."[207]

The *Rice* majority turned a blind eye to the scores of instances in which Congress has included "Native Hawaiians"—which it has defined as any descendant of the Islands' inhabitants prior to 1778, *without regard to blood quantum*—in statutory programs benefitting indigenous people nationwide.[208] Congress has repeatedly affirmed the "special trust" relationship the federal government enjoys with the Native Hawaiians and has specifically recognized Hawaiians as a "distinct and unique indigenous people."[209]

As amici for Hawaii crisply analogized the dilemma, under the terms of the HHCA, the "benefits conferred by . . . the trust . . . are no more a racial classification than the law providing compensation to Japanese internees during World War II."[210]

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205. *Id.* at 524 (Breyer, J., concurring) (quoting *Rice*, 528 U.S. at 519).

206. *See, e.g., Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. at 673; *Antelope*, 430 U.S. at 645-47; *Weeks*, 430 U.S. at 84-85; *Moe*, 425 U.S. at 479-80; *Fisher*, 424 U.S. at 390-91; *see also supra* note 103.

207. Rice v. Cayetano, 146 F.3d 1075, 1080 (9th Cir. 1998) (quoting Apology Resolution, 107 Stat. 1510 (1993)).

208. *See supra* note 103.

209. 20 U.S.C. § 7902(1), (10) (1994); 42 U.S.C. § 11701(1), (13), (15), (16), (18) (1994).

210. Brief of Amici Curiae Hou Hawaiians and Maui Loa, Native American Benefici-

B. *Power Struggle: The Feds v. the State*

The Court was adamant in holding that the OHA is wholly an affair of the state, and that Congress may not delegate to the states the power to enact laws fulfilling their trust obligations to Native Americans.[211] The Court held flatly, "Congress may not authorize a State to create a voting scheme of this sort."[212] The Court relied on *Yakima* for support, but the Court in *Yakima*, while recognizing that states generally do not have the same special relationship with Indians as the federal government, upheld a state law enacted to further a federal measure.[213]

In that case, the Yakima Indian Nation challenged a law that extended the state of Washington's "jurisdiction over Indians and Indian territory within the State."[214] Rejecting the Yakima Indian Nation's equal protection challenge to the law, the Court recognized that the "[s]tates do not enjoy th[e] same unique relationship with Indians [as the federal government]."[215] The Court, however, was careful to articulate that the states may legislate in Indian affairs if the legislation is made pursuant to a federal law.[216] Specifically, the law at issue in *Yakima* was not another state law per se, but "was enacted in response to a federal measure explicitly designed to [deal with the Indians.]"[217] To be sure, Hawaii's voting scheme fell within the context of *Yakima*, since it was enacted pursuant to the federally enacted HHCA.[218]

C. *The "Tribal" Threshold and its Ambiguities*

Crucial to the analysis of the *Rice* decision was the Court's determination that *Mancari* was not controlling. The Court's rejection of *Mancari*'s relevance to the facts of *Rice* reflects the Court's express abrogation of the need to determine whether Native Ha-

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aries at 8, *Rice*, 528 U.S. 495 (No. 98-818).

211. *See Rice*, 528 U.S. at 536 (Stevens, J., dissenting).

212. *Id.* at 519.

213. *See* Washington v. Confederated Bands & Tribes of the Yakima Indian Nation, 439 U.S. 463, 500-01 (1979).

214. *Id.* at 465.

215. *Id.* at 501.

216. *Id.*

217. *Id.*

218. *See* Respondent's Brief at 6-7, *Rice*, 528 U.S. 495 (No. 98-818).

waiians enjoy the same special relationship with the federal government as the Indians. Putting aside for the moment Justice Breyer's barb that the majority assumed what it chose not to decide,[219] a brief analysis of *Mancari*, as it relates to the "tribal threshold" requirement, is important.

In *Mancari*, the Court rested its opinion on, inter alia, the "special relationship" doctrine discussed in Part IV.A. Most importantly, the Court found it significant that the Indians in *Mancari* were "tribal" in nature.[220] This "tribal" classification, which suggests that organization and structure inhere in Indian culture, accomplished two important things for the *Rice* Court's calculus. First, it transformed the Indians into quasi-political entities, not racial bodies, thus negating any challenge that the Bureau's preference was rooted in a "racial," and therefore "suspect," classification.[221] Second, the Indians' "tribal" status supplied the critical link to the Indian Commerce Clause, which provides Congress with the power to "regulate commerce . . . with the Indian *Tribes*."[222]

While it is true that the Native Hawaiians are not a federally recognized tribe, the Court in *Rice* took the short view of history, and an even shorter view of existing law by deciding the case solely on Fifteenth Amendment grounds without giving proper attention to the equal protection guarantee of the Fourteenth Amendment. It would seem that an appropriate equal protection inquiry would have compelled the Court to determine just what status Native Hawaiians have.

The *Mancari* Court upheld the BIA's preference because of the federal government's special relationship with the Indians, not because the Indians were tribal in nature. The Court focused on the Indians' tribal status only to the extent that the preference challenged included as a requirement for eligibility that beneficiaries be members of "federally recognized tribes."[223] Indeed, that was the express language of the law.[224]

219. *Rice*, 528 U.S. at 524 (Breyer, J., concurring).
220. Morton v. Mancari, 417 U.S. 535, 551 (1974).
221. *Id.*
222. U.S. CONST. art. I, § 8, cl. 3 (emphasis added).
223. *Mancari*, 417 U.S. at 554 n.24.
224. *Id.*

The "tribal membership" requirement was not, however, the principal ground on which the Court rested its holding. Rather, the *Mancari* Court recognized the "unique *legal status* of Indian tribes under federal law and upon the plenary power of Congress, based on . . . the assumption of a 'guardian-ward' status, to legislate on behalf of federally recognized Indian tribes."[225]

Indeed, the scope of *Mancari* is as narrow as the issue in *Rice*. In *Mancari*, as in *Rice*, the purpose of the preference was to give indigenous people, who historically had been deprived of land and self-determination, greater participation in their own self-government, and to advance the government's trust obligations.[226]

Thus, in *Rice* the Court misapprehended—if not plainly misread—its prior logic in *Mancari*. Tribal membership was not the threshold issue in *Mancari*; rather, it was the special relationship doctrine.[227]

As such, one could construe *Rice* as overruling *Mancari*. The *Rice* majority adamantly held that *Mancari* was not controlling since the Indians in *Mancari* had a special relationship with the government, and the Native Hawaiians in *Rice* did not.[228] This is clearly not the case, if one is to place any stock in existing law.[229]

But *Mancari* is itself an interestingly flawed decision in at least two respects.[230] First, while the *Mancari* Court held that the plenary power of Congress over Indian affairs was rooted in the Indian Commerce Clause,[231] in *United States v. Kagama*,[232] the Court expressly rejected the clause as the source of such awesome congressional power.[233] The *Kagama* Court's rejection of the Indian Commerce Clause as the source of Congress's plenary power over Indians would seem to dilute what little emphasis the *Mancari* Court placed on "tribal membership."[234] Second, that the

225. *Id.* at 551 (emphasis added); *see also* Respondent's Brief at 30, *Rice*, 528 U.S. 495 (No. 98-818) (quoting *Mancari*, 417 U.S. at 551).

226. *Mancari*, 417 U.S. at 552.

227. *Id.*

228. *Rice*, 528 U.S. at 518.

229. *See supra* note 103 and accompanying text.

230. *See* Frickey, *supra* note 112, at 1763.

231. *Mancari*, 417 U.S. at 552.

232. 118 U.S. 375 (1886).

233. *Id.* at 385.

234. *See* Frickey, *supra* note 112, at 1763.

"tribal" affiliation rendered the preference in *Mancari* "political" rather than "racial" is a fallacy since blood quantum was a "but for" requirement of the preference.[235] Thus, it is difficult to square the majority's rejection of *Mancari,* where the preference was rooted in a racial classification, with the ancestral classification in *Rice.*

Of even greater significance to the Court's reasoning in *Rice* is the issue it expressly chose not to ponder—whether Native Hawaiians may be treated as Indian tribes. Specifically, Congress has expressly excluded Native Hawaiians from the "tribal membership" requirement. It "has extended to Native Hawaiians the same rights and privileges accorded to American Indian, Alaska Native, Eskimo, and Aleut communities."[236] The *Rice* Court thus failed to acknowledge the fact that it is the legal or political status of Native Hawaiians, *not* whether they are "tribal" entities, that determines whether they may be treated by the federal government in the same way as Indian tribes.

To be sure, in light of Congress's express recognition that Native Hawaiians enjoy the same special relationship with the federal government as all other Native Americans, "'tribal status' . . . is a poor proxy for determining whether Congress may legislate with respect to a particular indigenous group."[237]

Furthermore, the Court's refusal to consider Rice's Fourteenth Amendment equal protection challenge provided an escape hatch through which it could avoid making the crucial determination of whether Native Hawaiians enjoy the same special relationship with the federal government as do the Indian tribes. As such, the *Rice* decision is distinguished considerably from the Court's recent voting rights cases. Specifically, in *Shaw v. Reno,*[238] the Court struck down a North Carolina legislative map that promoted the interests of minority voters.[239] Finding the electoral

235. *See Mancari,* 417 U.S. at 551. The employment preference at issue in *Mancari* benefitted "qualified Indians." *Id.* at 538. The statute defined "Indians" as members of federally recognized tribes and "all other persons of one-half or more Indian blood." *Id.* at 553 n.24; *see also* Frickey, *supra* note 112.

236. 20 U.S.C. § 7902(13) (1994).

237. Respondent's Brief at 31, *Rice,* 528 U.S. 495 (No. 98-818).

238. 509 U.S. 630 (1993).

239. *Id.* at 642.

map unconstitutional on its face, the *Shaw* Court decided the case solely on the Fourteenth Amendment grounds.[240]

The distinction between *Rice* and *Shaw* is notable because the voting condition in *Shaw* did not expressly impose racial conditions. Rather, the condition resulted in the disproportionate racial impact of the legislative map *as applied*. In evaluating North Carolina's voting scheme, the Court looked to the more fundamental equal protection inquiry that the Fourteenth Amendment requires.[241] While the Congressional map at issue in *Shaw* was not facially race-based, like the scheme in *Rice*, it strains logic to assume, as the *Rice* Court did, that a law may offend the Fifteenth Amendment without squarely implicating the Fourteenth. To the extent that the Fifteenth Amendment expressly protects a right embedded in the Fourteenth, the two are twin amendments.

The OHA voting restriction in *Rice* expressly required that the electorate be limited to "Hawaiians" and "Native Hawaiians," as defined by statute in terms of blood quantum.[242] Consequently, the *Rice* Court was able to attack the scheme as a per se offense to the language of the Fifteenth Amendment.[243] For sure, steering clear of Rice's equal protection challenge made it possible for the Court to avoid having to tread "that difficult terrain"[244] of determining whether Congress—and by extension, the State of Hawaii—could treat Native Hawaiians as it does the Indian tribes. Accordingly, the formula applied by the *Rice* Court comports with its recent drive against any and all programs designed to benefit a particular racial class.[245] Congress has not, as of yet, shared this sentiment.[246]

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240. *Id.* at 640-41. The court stated:

> Drawing on the "one person, one vote" principle [of the Fourteenth Amendment], this Court recognized that "[t]he right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot." . . . It is against this background that we confront the question presented here.

Id. (quoting Allen v. State Bd. of Elections, 393 U.S. 544, 569 (1969)).

241. *Id.* at 649.

242. HAW. REV. STAT. § 10-2; *see supra* note 5.

243. *Rice*, 528 U.S. at 523.

244. *Id.* at 519.

245. *See* Biskupic, *supra* note 17.

246. *See supra* note 103 (listing a handful of the more than 160 laws that give preferences to Native Hawaiians and in which Congress has explicitly included "Native Hawaiians" in its definition of "Native American").

D. *The Applicable Standard: The Problem of Strict Scrutiny*

Before the decision in *Rice*, several commentators suggested that some doubt had been cast on whether the Court's decision in *Adarand Constructors v. Pena*[247] would force laws aimed at benefitting racial minorities to pass muster under strict scrutiny analysis.[248] That is, such a law would have to be narrowly tailored to achieve a compelling governmental interest.[249] Indeed, the Court in *Adarand* premised its decision on one simple notion: "'[a]ny preference based on racial or ethnic criteria must necessarily receive a most searching examination.'"[250]

Adarand involved the question of what standard of review should apply to congressionally enacted race-conscious set-asides.[251] The plaintiff in *Adarand* was a white-owned construction firm that submitted the lowest bid on a contract to supply guardrails to a federal highway project in Colorado.[252] Because of a federal affirmative action program designed to give general contractors incentives to hire minority-owned subcontractors, the bid went to a minority-owned firm.[253]

Wishing "to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact,'"[254] the Court nevertheless held that the government bore the burden of proving that the affirmative action program was narrowly tailored to achieve its compelling interest in compensating for past discrimination. The Court remanded the case back to the lower court in order to make this determination.[255] Writing for the majority, Justice O'Connor concluded that "whenever the government treats any person une-

247. 515 U.S. 200 (1995).

248. *See* Benjamin, *supra* note 19. *But cf.* Frickey, *supra* note 112; Van Dyke, *supra* note 19.

249. *See infra* note 257 and accompanying text.

250. *Adarand*, 515 U.S. at 219 (quoting Fullilove v. Klutznick, 448 U.S. 448, 491 (1980)).

251. *Id.*

252. *Id.* at 205.

253. *Id.* The federal regulation at issue in *Adarand* involved Disadvantaged Business Enterprises ("DBE"s). *See id.* at 205. DBEs were minority-owned firms that qualified for special status under federal regulations. *Id.* at 206-09. Under the regulatory scheme, primary contractors were not required to award contracts to DBEs, but were given a strong financial incentive by the federal government to do so (10% of the subcontract amount, or 1.5% of the amount of the primary contract, whichever was less). *Id.* at 209.

254. *Id.* at 237 (quoting *Fullilove*, 448 U.S. at 519).

255. *See id.* at 237-38.

qually because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection."[256]

Adarand is important for three reasons. First, it stands for the rule that both the federal and state governments must satisfy the same strict scrutiny analysis for any race-based affirmative action program.[257] Second, the strict scrutiny rule spelled out in *Adarand* is not limited to minority set-asides; it applies to all domains, such as education admissions and employment.[258] Finally, despite the seemingly broad sweep of *Adarand*, the Court suggested it may be willing to grant Congress greater deference than it would a state or local government.[259] For instance, the Court might be more likely to accept congressional findings that there had been discrimination in a particular domain, or at a particular time in history, than it would from a state or local governmental body.[260]

Of course, the question then remains: what does *Adarand* do to *Rice*, or what should it have done? The answer, arguably, is nothing. Because the *Rice* Court struck down Hawaii's voting scheme solely on Fifteenth Amendment grounds, the Court avoided any equal protection inquiry entirely.[261] Had the Court not ignored Rice's Fourteenth Amendment equal protection challenge, however, *Adarand* would most certainly have been implicated. Indeed, the very commentators who scratched their heads at the *Adarand* decision were clearly of the view that any challenge to race-based preferences benefitting Native Hawaiians would necessarily implicate the clear "strict scrutiny" rule set forth in *Adarand*.[262]

But there was, prior to the *Rice* decision, a polar view that equal protection challenges to laws giving preferences to Native

256. *Id.* at 229.

257. *See id.* at 235 ("Federal racial classifications, like those of a State, must serve a compelling governmental interest, and must be narrowly tailored to further that interest.").

258. *Id.* at 240 (Thomas, J., concurring).

259. *Id.* at 230.

260. *Id.*

261. *See* Rice v. Cayetano, 528 U.S. 495, 523 (2000).

262. *See, e.g.*, Benjamin, *supra* note 19, at 539 (arguing that in light of *Adarand*, if a statutory "definition constitutes a racial classification . . . all legislation treating Native Hawaiians specially is presumptively invalid").

Hawaiians based on race would not implicate *Adarand*.[263] To these commentators, either of two scenarios governed the fate of the Native Hawaiians in light of *Adarand*.[264] One, Congress had clearly articulated that there exists a special relationship between the United States and the Native Hawaiian people.[265] As recently as the 1993 Apology Resolution,[266] Congress expressly stated that United States participation in the 1893 overthrow of the Hawaiian Monarchy violated "treaties between the two nations and . . . international law."[267] Moreover, Congress was careful to note that "Hawaii also ceded 1,800,000 acres of crown, government and public lands . . . without the consent of or compensation to the Native Hawaiian people . . . or their sovereign government."[268] Because of the wrongs committed against the Native Hawaiians by the United States—wrongs identical to those committed against the Native Indians—Congress urged the United States "to support reconciliation efforts between the United States and the Native Hawaiian people."[269]

Thus, just as with the Indians in *Mancari*, Native Hawaiians would be "judicially immunized" by the special relationship doctrine from equal protection challenges based on racial classifications.

The second, more complex analytical regime, sets forth the notion that if *Adarand* is to be construed broadly, the decision necessarily would have overruled scores of cases in which the Court upheld racial preferences for Indians.[270] However, in *Adarand*, the Court made clear that it was reluctant to reopen issues "in which [it] found special deference to the political branches of the Federal Government to be appropriate."[271] It had been argued that this "cryptic reference" by the Court suggested that it would

263. *See, e.g.*, Van Dyke, *supra* note 19, at 100 (reasoning that because "courts have . . . ruled consistently that programs for Native Hawaiians should be examined using the same level of review (rational basis) that applies to programs for other Native Americans," any equal protection challenge of the sort in *Rice* would likely escape *Adarand*'s grip).

264. *See, e.g., id.*

265. *Id.* at 107.

266. Apology Resolution, 107 Stat. 1510, 1513 (1993).

267. *Id.* at 1511.

268. *Id.* at 1512.

269. *Id.* at 1513.

270. Frickey, *supra* note 112, at 1766.

271. Adarand Constructors v. Pena, 515 U.S. 200, 218 (1995).

"be reluctant to upset longstanding arrangements, even though they might arguably involve some discriminatory element."[272]

This latter view reasoned that challenges of the sort in *Rice* would escape strict scrutiny because of *Adarand*'s implied exception to previous laws which gave preferences to Native Americans. This view does not resolve the fate of future legislation with preferences for Native Hawaiians, or, for that matter, Native Indian tribes.

In short, the Court left open the question whether strict scrutiny applies to race-based preferences for Native Hawaiians. By ignoring out-of-hand Rice's Fourteenth Amendment equal protection challenge to Hawaii's voting law, the Court left two critical questions for commentators and, more significantly, Native Hawaiians to ponder. First, do the Native Hawaiians enjoy the same special relationship with the United States as the Native Americans? Second, what level of scrutiny should apply to laws that give preferences to Native Hawaiians? The answer to the second question, of course, is wholly dependent upon the answer to the first. Sadly, the Court refused to offer any guidance on these important matters.

VI. THE IMPACT

Limited as it was to the OHA voting scheme, it is likely the *Rice* decision will have no immediate implications beyond Hawaii. It may well invite additional challenges to programs designed to benefit Native Hawaiians, of which there are many, from programs financed by the revenues from public land administered in trust for the Native Hawaiians, to tuition grants and homesteading rights.[273]

While the *Rice* majority was careful to say that "we assume the validity of the underlying administrative structure and trusts, without intimating any opinion on that point,"[274] the decision nevertheless suggests that Native Hawaiians do not, more than 100 years after America's participation in the overthrow of the Hawaiian monarchy, enjoy the same special relationship with the

272. Frickey, *supra* note 112, at 1766.

273. *See* Greenhouse, *supra* note 143, at A16.

274. *Rice*, 528 U.S. at 521-22.

United States government as all other Native Americans. Indeed, the question remains whether Native Hawaiians even *are* Native Americans in the legal sense.

To be sure, the case has presented a call to politicians to introduce legislation that would expressly recognize Native Hawaiians as indigenous people who enjoy a trust relationship with the federal government and have a right to self-determination under federal law.

In fact, on July 20, 2000, Senator Daniel Kahikina Akaka (D-HI), along with Senator Daniel K. Inouye (D-HI), introduced a bill which, if adopted into law, would articulate once and for all the United States' policy toward Native Hawaiians.[275] Specifically, the bill calls for Congress to recognize that "the Native Hawaiian people wish to preserve, develop, and transmit to future Native Hawaiian generations their . . . political and cultural identity . . . and to achieve greater self-determination over their own affairs."[276]

If adopted into law, the bill would also provide that "the United States has recognized and reaffirmed the *special trust relationship* with the Native Hawaiian people through . . . the enactment of the [Hawaiian Admission] Act."[277] In addition, the bill would establish within the Department of the Interior an Office of the Special Trustee for Native Hawaiian Affairs.[278] Among the Trustee's duties would be to "effectuate and coordinate the special trust relationship between the Native Hawaiian people and the United States."[279]

Senator Akaka has stated the primary purpose behind the bill as follows:

> When the State of Hawaii was admitted into the Union in 1959, the prevailing Federal policy was the termination of Federal responsibilities related to America's native people and the delegation of those responsibilities to the several states. Accordingly, the Hawaii Admissions Act provided that the State of Hawaii would assume a trust responsibility for lands that had been set aside under Federal law in

275. S. 2899, 106th Cong. (2000).
276. *Id.* § 1(15).
277. *Id.* § 1(18)(A) (emphasis added).
278. *Id.* § 4.
279. *Id.* § 4(b)(1).

> 1921 in Hawaii for the benefit of Native Hawaiians, and further provided that the balance of other lands in Hawaii which were ceded back to the State of Hawaii by the United States were required to be held in a public trust for five purposes—one of which was the betterment of the conditions of Native Hawaiians.[280]

This proposed legislation would make clear that the indigenous native people of the United States, American Indians, Alaskan Natives, and Native Hawaiians, have the same status under federal law and policy—the right to self-determination and self-governance, and a federally recognized, government-to-government relationship with the United States.[281]

Alternatively, should Senator Akaka's bill not reach a vote, or otherwise vanish from the legislative blackboard, Hawaii could open the OHA elections to everyone, make the agency's trustees board-appointed rather than elected, or reorganize the OHA so that it is no longer a state agency.[282]

Finally, there is of course the fear that the *Rice* ruling may undermine the special status of the Indian tribes, which, unlike the Native Hawaiians, conduct their own elections and have a myriad of programs with preferences based on race. Such fears should be quelled, however, by the Court's express language that in dealing with preferences singling out members of Indian tribes for special treatment, the Court has repeatedly recognized that the preferences were "'political rather than racial in nature.'"[283]

The Court drew a clear distinction between Hawaii's voting scheme and tribal preferences by reasoning that "[i]f a non-Indian lacks a right to vote in tribal elections, it is for the reason that such elections are the internal affair of a quasi-sovereign."[284] The voting scheme at issue in *Rice*, by contrast, involved an affair of the entire state of Hawaii. Yet, the ground on which this premise rests is misguided: the Court has expressly held that a state may enact legislation with preferences so long as the law is made pur-

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280. Senator Daniel K. Akaka, Statement Regarding Indian Affairs Hearing on S. 2899 (Sept. 14, 2000), *available at* http://www.akaka2000.org/PRSept14.html.

281. *Id.*

282. *See* Greenhouse, *supra* note 143.

283. Rice v. Cayetano, 528 U.S. 495, 520 (2000) (quoting *Mancari*, 417 U.S. at 553 n.24).

284. *Id.*

suant to a congressional mandate.[285]

Thus, by the Court's reasoning, tribal Indian voting schemes are "immune" from judicial scrutiny because of the Indians' special relationship status with the federal government—a classification the Court, in spite of Congress, has yet to bestow upon the Native Hawaiians.

VII. CONCLUSION

The United States Supreme Court's decision in *Rice* is significant for five distinct reasons. First, *Rice* offers little in the way of defining what, if any, special relationship Native Hawaiians enjoy with the federal government. The Court avoided determining whether Native Hawaiians enjoy a special trust relationship of the sort that Native Americans do.[286] Turning a blind eye to the more than 160 congressional laws that include "Native Hawaiian" in their definition of "Native American," the Court, as Justice Breyer aptly noted in his concurring opinion, assumed without deciding that Hawaii could treat Hawaiians or Native Hawaiians as Indian tribes.[287]

Second, by rejecting Rice's Fourteenth Amendment equal protection challenge, the Court abrogated an opportunity to announce what level of scrutiny applies to government programs that give preferences to Native Hawaiians. While one might assume that *Adarand* is a narrowly held affirmative action decision inapplicable to a Hawaiian voting restriction, an alternative reading suggests *Adarand* should not apply at all to a law like the one at issue in *Rice*—a law which on its face so squarely violated the Fifteenth Amendment.

Still, *Rice* might seem to stand for the premise that any race-based legislation designed to benefit Native Hawaiians will be held to strict scrutiny, not the more relaxed rational basis review standard accorded legislation favoring Native Americans. To be sure, this was the fear expressed by commentators in light of *Adarand*.[288] But as we have seen, *Adarand* and all its legal impli-

285. *See supra* Part IV.B.
286. *Rice*, 528 U.S. at 518-19.
287. *Id.* at 524 (Breyer, J., concurring).
288. *See* Benjamin, *supra* note 19.

cations with respect to raced-based preferences vanished from the inquiry once the Court held that it could "stay far off that difficult terrain"[289] of determining whether Congress could treat Native Hawaiians as it does the American Indians.

Third, in *Rice*, the Court once again defined the *Salyer* line of cases, and in so doing held those cases irrelevant to the facts of *Rice*.[290] Unlike the issues in the "special purpose district" cases, the Court held that *Rice* did not implicate the one-person, one-vote requirement of the Fourteenth Amendment. Had the Court not dispensed with Rice's equal protection challenge, however, it would have had to clarify whether the reasoning behind the *Salyer* line of cases may extend beyond concerns surrounding the ownership of real property to racial barriers in voting.

Fourth, the *Rice* decision is consistent with the Court's recent, and not so recent, line of Fifteenth Amendment cases that squarely target race-based conditions of voting. This seems what the Court wished the decision to stand for when it held, in what is the "soul" of the case:

> The State's position rests, in the end, on the demeaning premise that citizens of a particular race are somehow more qualified than others to vote on certain matters. That reasoning attacks the central meaning of the Fifteenth Amendment . . . .
>
> When the culture and way of life of a people are all but engulfed by a history beyond their control, their sense of loss may extend down through generations; and their dismay may be shared by many members of the larger community. As the State of Hawaii attempts to address these realities, it must, as always, seek the political consensus that begins with a sense of shared purpose. One of the necessary beginning points is this principle: The Constitution of the United States, too, has become the heritage of all the citizens of Hawaii.[291]

Finally, the *Rice* decision has galvanized the Hawaiian delegation into political action. Senator Akaka has introduced a bill that would officially recognize that "the Native Hawaiian people wish to preserve, develop, and transmit to future Native Hawaiian generations their . . . political and cultural identity . . . and to

289. *Rice*, 528 U.S. at 519.
290. *Id.* at 522.
291. *Id.* at 523-24.

achieve greater self-determination over their own affairs."[292] More significantly, the bill calls for Congress to recognize the "special trust relationship between the Native Hawaiian people. . . . and the United States."[293] To be sure, such express Congressional language, coupled with existing law classifying Native Hawaiians as analogous to the Indian tribes, would have made it much more difficult for the *Rice* Court to reach the decision it did.

William E. Spruill

292. S. 2889, 106th Cong. § 1(15) (2000).
293. *Id.* § 4.

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